

**Michael H. Milby, Clerk of Court**

2195



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## I. INTRODUCTION

Conseco offers no compelling reason for the Court to overrule its June 1, 2004 Order granting Lead Plaintiff leave to give notice pursuant to Rule 23(d)(2) to certain class members who purchased Foreign Debt Securities. Contrary to Conseco's assertion, no manifest injustice will be visited upon purchasers of Yosemite I, CLN I or CLN II when the notice is issued.

## II. ARGUMENT

### A. The Regents' Notice Is Accurate Regarding §10(b) Claims

Conseco's Motion for Reconsideration – just like its initial opposition – ignores or misinterprets the record in this case. In fact, Conseco offers nothing in its Motion for Reconsideration that it had not argued before. Conseco concedes (as it must) that The Regents has standing under §10(b) to bring claims based on five credit linked notes, but again wrongly asserts Lead Plaintiff's claim as to Yosemite I is time barred. Conseco Mot. at 2-6. As Lead Plaintiff demonstrated in its surreply to Conseco's motion for lead plaintiff (Conseco Docket No. 16), the Court's April 1, 2004 Order regarding Citigroup's motion to dismiss (Docket No. 2050) confirms that The Regents has standing to bring §10(b) and related §20(a) claims based on Yosemite I (as well as the other credit linked notes Conseco purports to represent). In the Citigroup Order the Court held Lead Plaintiff has standing under §10(b) to bring claims based on the following securities:

[T]he 9/23/99 offering by Osprey Trust Osprey I of 8.31% Senior Secured Notes due in 2003; the 11/15/99 offering by *Yosemite Securities Trust I of 8.25% Series 1999-A Linked Enron Obligations due on November 15, 2003*; the 2/15/00 offering by *Yosemite Securities Co. Ltd. of 8.75% Series 1999-A Linked Enron Obligations due in 2007*; the 8/17/00 offering by Enron Credit Linked Notes Trust of 8% Enron Credit Linked Notes due in 2005; the 5/17/01 offering by Enron Euro Credit linked Notes Trust of 6.5% Enron Euro Credit Linked Notes due in 2006; the 5/17/01 offering by Enron Credit Linked Notes Trust II of 7.75% Enron Credit Linked Notes due in 2006; and the 5/17/01 offering by Enron Sterling Credit Linked Notes Trust of 7.25% Enron Sterling Credit Linked Notes due in 2003.

April 1, 2004 Citigroup Order at 2-3. The Court also turned aside arguments by defendants that claims based on the credit linked notes were time-barred. “[T]he Amended Consolidated Complaint

was timely filed for limitations purposes.” *Id.* at 5. Critically, the Court noted that “[w]ith respect to §10(b), the Court has recognized that where class members allege a course of conduct or illegal scheme, the class representative may have purchased different types of securities than those in the class.” *Id.* at 4.

Conseco’s attempt to distinguish the April 1 Order fails. Conseco ignores the fact the Court held that The Regents has standing to bring §10(b) claims on behalf of purchasers of Yosemite I and the fact that the Court turned aside defendants’ timeliness challenges. As detailed in Lead Plaintiff’s surreply on Conseco’s motion for lead plaintiff, the April 1, 2004 Order is well-founded because, since April 8, 2002, Lead Plaintiff has pressed claims against Citigroup (and others) based on its participation in a fraudulent scheme that included the Yosemite offering. *See, e.g.*, April 8, 2002 Consolidated Complaint, ¶¶49, 473-474. Since April 8, 2002, The Regents has pleaded claims against Citigroup under §10(b) and §20(a). There can be no dispute, that at very least, Lead Plaintiff has a claim based on Citigroup’s actions as a controlling person of its subsidiaries. Those subsidiaries were added as named defendants in the Amended Complaint filed on May 14, 2003 (Docket No. 1388).<sup>1</sup> There is no requirement that the controlled persons or entities be before the Court for controlling person liability to attach. “It is established that the plaintiff need not proceed against the principal perpetrator, nor need the principal perpetrator be identified in the complaint.” *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1170 n.47 (D.C. Cir. 1978). A plaintiff may pursue control claims if the factual basis for a predicate violation is sufficient, notwithstanding, procedural bars to naming the primary violator. *See* Lead Plaintiff’s Memorandum in Opposition to the Bank Defendants’ Motions to Dismiss the First Amended Consolidated Complaint (“Lead Plaintiff’s

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<sup>1</sup> For limitations purposes, the Court has held January 14, 2003 is the date the Amended Complaint was deemed filed. *See* March 29, 2004 Memorandum and Order re Merrill Lynch and Deutsche Bank Entities at 74.

Opposition”) (Docket No. 1574) at 57-58 (setting forth authorities, including this Court, holding that plaintiff need not sue the primary violator to bring a claim against one who controls it). Thus even assuming, *arguendo*, Consecro is correct (that Lead Plaintiff does not have a §10(b) claim based on Yosemite I), purchasers of Yosemite I have a timely claim, in the *Newby* action, under §20(a) against Citigroup. Thus Lead Plaintiff’s notice is not misleading, and no manifest injustice will befall Yosemite I purchasers when the notice is issued.

**B. The Regents’ Notice Is Accurate Regarding §12(a)(2) Claims**

Consecro also suggests purchasers of Yosemite I, CLN I and CLN II will be misled regarding their §12(a)(2) claims when The Regents’ notice is disseminated. Not so. Lead Plaintiff’s notice states that “unless a class member to whom this notice is directed steps forward to serve as a class representative on the Section 12(a)(2) claims, those Section 12(a)(2) claims on behalf of a putative class may be dismissed.” Notice at 2 (attached hereto). Consecro takes issue with this part of the notice because it claims it has standing to assert §12(a)(2) claims based on those three offerings in its action. Consecro Mot. at 6. But Lead Plaintiff is specifically following guidance from the Court in the *Newby* action which has made clear that if at the time of class certification purchasers with privity do not step forward to press §12(a)(2) claims, those claims will be dismissed. *See, e.g.*, April 1, 2004 Order re CIBC Defendants’ Motion to Dismiss at 12; March 31, 2004 Order re Credit Suisse Defendants’ Motion to Dismiss at 15. Purchasers are in no way misled about their claims and Consecro’s arguments to the contrary should be rejected – again.

Notably, all of Consecro’s concerns regarding §12(a)(2) claims would be dispensed with if, as Lead Plaintiff has suggested, Consecro would act as a class representative in the *Newby* action on behalf of purchasers of the three securities it actually purchased. This course of action would best serve the *entire* class.


### III. CONCLUSION

Conseco – the lone opponent to giving notice – has failed to demonstrate the Court's June 1, 2004 Order was in error. For the foregoing reasons, its Motion for Reconsideration should be denied.

DATED: June 8, 2004

Respectfully submitted,

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES  
LITIGATION

§ Civil Action No. H-01-3624  
§ (Consolidated)  
§

§ CLASS ACTION  
§

\_\_\_\_\_  
This Document Relates To:

MARK NEWBY, et al., Individually and On  
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

\_\_\_\_\_  
THE REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, et al., Individually and On Behalf  
of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

NOTICE OF POTENTIAL DISMISSAL OF CERTAIN CLAIMS

EXHIBIT A

**TO: ALL PERSONS WHO, BETWEEN OCTOBER 19, 1998 AND NOVEMBER 27, 2001, PURCHASED ANY OF THE FOLLOWING SECURITIES:**

Marlin Water Trust II/Marlin Water Capital Corp. II 6.19% Notes due 7/15/03

Marlin Water Trust II/Marlin Water Capital Corp. II 6.31% Notes due 7/15/03

Enron Euro Credit Linked Notes Trust 6.5% Notes due 5/24/06

Enron Credit Linked Notes Trust II 7.375% Notes due 5/15/06

Enron Sterling Credit Linked Notes Trust 7.250% Notes due 5/24/06

Osprey Trust/Osprey I, Inc. 7.797% Notes due 1/15/03

Osprey Trust/Osprey I, Inc. 6.375% Notes due 1/15/03

Enron Credit Linked Notes Trust 8.0% Notes due 8/15/05

Yosemite Securities Company Ltd. 8.75% Notes due 2/23/07

Yosemite Securities Trust I 8.25% Notes due 11/15/04

**FROM ANY OF THE FOLLOWING:**

Banc of America Securities Limited

Banc of America Securities LLC

Barclays Capital

Credit Suisse First Boston

CIBC World Markets

Deutsche Bank

Deutsche Banc Alex. Brown

Greenwich NatWest

JPMorgan

Lehman Brothers

Schroder Salomon Smith Barney

Salomon Smith Barney

Salomon Smith Barney International

The Royal Bank of Scotland, Financial Markets

The Royal Bank of Scotland plc

This Notice of potential dismissal of §12(a)(2) claims is given pursuant to Rule 23(d)(2) of the Federal Rules of Civil Procedure to inform you that:

1. The Regents of the University of California, as Lead Plaintiff in the *Enron Securities Litigation* ("The Regents"), has filed claims on your behalf for violations of §12(a)(2) of the Securities Act of 1933 and §10(b) of the Securities Exchange Act of 1934 based on the purchase of the above-listed securities. The Honorable Melinda Harmon has stated that The Regents may, on your behalf, pursue the §10(b) claims, which are fraud claims. However, The Regents may not pursue your §12(a)(2) claims, which are not fraud claims, because neither The Regents nor another class representative purchased the securities identified above from the defendants listed above. Accordingly, you are hereby notified that unless a class member to whom this notice is directed steps forward to serve as a class representative on the §12(a)(2) claims, those §12(a)(2) claims on behalf of a putative class may be dismissed. The §12(a)(2) claim does not require proving reliance or scienter as the §10(b) claim does. In sum, the §12(a)(2) claim is easier to prove.

2. If you are interested in serving as a class representative on the §12(a)(2) claims or if you have any question about this Notice, please write to either William S. Lerach or Helen J. Hodges, Lerach Coughlin Stoia & Robbins LLP, 401 B Street, Suite 1700, San Diego, California 92101.

**DO NOT CONTACT THE COURT REGARDING THIS NOTICE**

DATED: \_\_\_\_\_, 2004

**BY ORDER OF THE UNITED STATES  
DISTRICT COURT, SOUTHERN DISTRICT  
OF TEXAS, HOUSTON DIVISION**

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THE HONORABLE MELINDA HARMON

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO CONSECO'S MOTION FOR RECONSIDERATION OF THE COURT'S JUNE 1, 2004 ORDER GRANTING LEAD PLAINTIFF LEAVE TO GIVE NOTICE PURSUANT TO RULE 23(d)(2) (DOCKET NO. 2184) document has been served by sending a copy via electronic mail to serve@ESL3624.com on this June 8, 2004.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO CONSECO'S MOTION FOR RECONSIDERATION OF THE COURT'S JUNE 1, 2004 ORDER GRANTING LEAD PLAINTIFF LEAVE TO GIVE NOTICE PURSUANT TO RULE 23(d)(2) (DOCKET NO. 2184) document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this June 8, 2004.

Carolyn S. Schwartz  
United States Trustee, Region 2  
33 Whitehall Street, 21st Floor  
New York, NY 10004



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Mo Maloney